

**GARRLET P. FECHT**  
Claimant

**SYRACUSE FEED YARD, INC.**  
Respondent

**CIGNA INSURANCE COMPANY**  
Insurance Carrier

[illegible]

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was working for respondent on November 5, 1992, when he suffered injury to his low back while operating a piece of equipment called a Melroe Bobcat. As a result of this injury, claimant applied for and received long-term disability. On May 24, 1993, respondent terminated claimant's employment, being unable to accommodate claimant's restrictions. Claimant was able to return to work in May 1994 part-time on a farm, and in October 1994, claimant opened his own business.

Claimant and respondent agree claimant has not returned to work at a comparable wage and is, therefore, eligible for work disability.

K.S.A. 1992 Supp. 44-510e defines work disability as:

. . . the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation . . .

The record contains only one opinion regarding claimant's loss of ability to perform work in the open labor market, that being the opinion of Michael Dreiling, a vocational expert. Respondent and claimant both agreed that the 15 percent loss of access to the open labor market opinion issued by Mr. Dreiling is appropriate in this instance. The only issue left for consideration is the claimant's ability to earn a comparable wage and how much, if any, this has been reduced.

The parties stipulated at regular hearing that claimant's average weekly wage on the date of accident, including fringe benefits, was \$391.45. In the briefs submitted by the parties, and at oral argument, the parties stipulated the wages representing claimant's income in 1995 and 1996 and the method used in computing those wages were appropriate for use in computing claimant's post-injury wage earning ability. The numbers submitted by claimant and respondent were identical, with only two exceptions. Claimant requested a reduction for the self-employment tax paid by claimant in 1995 and 1996. Respondent's attorney agreed at oral argument before the Board that this reduction was appropriate.

In addition, claimant argued in his brief that a 20 percent loss in earnings due to the lack of a similar comprehensive fringe benefit package should be considered. However, at oral argument, claimant agreed that the fringe benefit package was included in the \$391.45 average weekly wage. Therefore, a comparison of claimant's current earnings with the average weekly wage from the date of accident would include consideration of any loss of the comprehensive fringe benefit package claimant had while employed with respondent.

The Administrative Law Judge adopted the opinion of Michael Dreiling that claimant had a 37 percent loss of ability to earn comparable wages. However, Mr. Dreiling's opinion does not take into consideration the actual income generated by claimant and stipulated to by the parties. In addition, the method used by Mr. Dreiling in computing a 37 percent loss of wage earning capacity does not compare claimant's average weekly wage, as agreed to, with claimant's actual ability to earn wages post-injury. Mr. Dreiling merely compares hourly rate to hourly rate and adds an additional unexplained 20 percent based upon a loss of fringe benefits. The Appeals Board, therefore, adopts the figures from claimant's and respondent's briefs and, after deducting the self-employment tax, computes a 28 percent loss of ability to earn comparable wages.

K.S.A. 1992 Supp. 44-510e requires that both the loss of access to the open labor market and loss of ability to earn comparable wages must be considered in computing work disability. The Appeals Board, in giving equal weight to each, finds claimant has suffered a 21.5 percent permanent partial disability as a result of the injury suffered with respondent on November 5, 1992. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

At the regular hearing, it was stipulated that claimant was paid 43 weeks temporary total disability compensation at the appropriate rate of \$260.98 per week, and, in addition, 96 weeks permanent partial disability compensation at the rate of \$26.10 per week totaling \$2,505.60. As claimant did not return to work with respondent after the November 5, 1992, accident, the work disability would commence immediately after the accident. Any sums paid on a voluntary basis will entitle respondent to a credit in the final award for the amounts paid.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated June 5, 1998, and the Nunc Pro Tunc Award dated June 12, 1998, both entered by Administrative Law Judge Jon L. Frobish, should be, and are hereby, modified, and claimant, Garrlet P. Fecht, is granted an award against the respondent, Syracuse Feed Yard, Inc., and its insurance carrier, CIGNA Insurance Company, for an accidental injury occurring on November 5, 1992, and based upon an average weekly wage of \$391.45, for a 21.5 percent permanent partial disability to the body as a whole.

Claimant is entitled to 43 weeks temporary total disability compensation at the rate of \$260.98 per week totaling \$11,222.14, followed thereafter by 372 weeks permanent partial disability compensation at the rate of \$56.11 per week totaling \$20,872.92, for a total award of \$32,095.06.

As of January 13, 1999, claimant would be entitled to 43 weeks temporary total disability compensation at the rate of \$260.98 per week totaling \$11,222.14, followed by 279.86 weeks permanent partial disability compensation at the rate of \$56.11 per week totaling \$15,702.94, for a total due and owing of \$26,925.08, which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 92.14 weeks permanent partial disability compensation at the rate of \$56.11 per week, until fully paid or until further order of the Director.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is hereby approved.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Underwood & Shane	
Transcript of Preliminary Hearing	\$113.00
Transcript of Preliminary Hearing	\$ 98.50
Transcript of Preliminary Hearing	\$129.50
Transcript of Regular Hearing	\$255.50
Jay E. Suddreth & Associates, Inc.	
Deposition of Michael Dreiling	Unknown
Cindy L. Fenton, CSR	
Deposition of Etnah Morgan	Unknown
Deposition of Garrlet Fecht	Unknown
CRS Court Reporting Service	
Deposition of Blake Veenis, M.D.	\$139.40
Appino & Biggs Reporting Service	
Deposition of Sergio Delgado, M.D.	\$132.00
K. Pfannenstiel Reporting & Assoc.	
Deposition of Raymundo Villanueva, M.D.	\$120.69

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. McFarland, Garden City, KS  
Terry J. Malone, Dodge City, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director